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REFLECTIONS ON A *LIGHT UNSEEN*

VINCENT ROUGEAU[†]

INTRODUCTION

I am very pleased to have an opportunity to offer some reflections on the manuscript for *A Light Unseen* by Professors John Breen and Lee Strang. It is an extraordinarily comprehensive look at the history of Catholic law schools in the United States. That aspect of the work alone makes it an important contribution to the scholarship on Catholic higher education in this country, and I am sure it will become an essential resource for scholars and educators across a wide range of fields. Nevertheless, *A Light Unseen* is much more than a history. It also raises a critical question: What does it mean to be a *Catholic* law school? It is a query that has generated much controversy in recent decades, particularly in the United States, and it has been answered in different ways across time and place. Professors Breen and Strang determine that past attempts to establish meaningful Catholic identity in American law schools have been wanting, and they propose a thought-provoking solution for the future.

As we confront that future, however, we cannot ignore the public health crisis in which we currently find ourselves. Who could have known that the conference we attended to discuss *A Light Unseen* would be one of the last times most of us would gather for an event of that type or size for the foreseeable future? Even more unforeseeable was the shutdown of the economy and the shift to online learning at our universities that followed. These events will transform the world as we knew it, and they require a renewed assessment of the future of Catholic law schools. Fortunately, we have *A Light Unseen* to provide a platform for discussion of the road ahead.

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The authors offer this critique as a major thesis of their work:

One would expect that an academic institution (such as a law school) that claimed to be founded under a Catholic inspiration would be animated by Catholic ideas that informed the substance of its operations. In particular, one would expect that the Catholic understanding of the law in general (jurisprudence) and in a particular jurisdiction (the positive law) as well as the ultimate subject of law (the human person) and the end of law (justice) would inform a Catholic law school in the curriculum it offered, the teaching methods it employed, the questions it posed, and the scholarly answers it proposed. But in the case of American Catholic legal education, one would be mistaken for so thinking.¹

Breen and Strang conclude that Catholic law schools in the United States are not particularly Catholic. They do not find them truly animated by a Catholic worldview or by Catholic intellectual life, and for the most part, they view them as indistinguishable from their secular peers:

These schools fit comfortably within the established mold of American legal education, yet by their own admission, these schools are supposed to be distinctive—to offer not only a solid grounding in legal analysis and doctrine, but to provide something more and different owing to their Catholic identity. As the book explains, with certain discrete exceptions that varied over the span of years and with individual schools, they failed in his regard. They succeeded as law schools but failed as Catholic law schools. One of the principal goals of this book is to explore this failure and to examine the causes behind it.²

In other words, Breen and Strang argue that because Catholic law schools in the United States are not *distinctive* in a way that is an obvious expression of their Catholic identity, these institutions have failed as *Catholic* law schools. With this central idea of the manuscript as background, my reflections will engage the authors on two major points. First, I want to inquire more deeply about how we define “Catholic” in the context of the history of Catholic legal education in the United States, and I will argue that this history demonstrates something distinctively

¹ John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 8 (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John's Law Review*).

² *Id.* at 10 (emphasis omitted).

Catholic in the mission of American Catholic law schools. Second, I will offer some thoughts about the authors' ideas for making Catholic law schools more "Catholic" going forward, particularly in light of the COVID-19 crisis producing inevitable changes in our economic and social order.

I. HISTORY OF CATHOLIC LAW SCHOOLS IN THE UNITED STATES

As Breen and Strang deftly show, Catholic law schools in the United States were not established to promote a Catholic view of the law, which was more or less assumed as part of the enterprise, for specific cultural and practical reasons.³ The most important of these was to aid the country's burgeoning, and largely immigrant, Catholic population as its members strove to ascend the ranks of American society.⁴ This mission developed in response to specific socio-cultural conditions that Catholics faced in American society as the nation developed. Although the United States Constitution protected religious freedom, in most parts of the country, Catholicism was viewed with hostility, and Catholics were outsiders through the better part of the nation's history.

American cultural and settlement conditions were unique. Catholic law schools as they exist in the United States are rarely seen in other parts of the world.⁵ Indeed, most countries and legal systems educate lawyers in undergraduate schools, which makes Catholic law schools in the United States even more peculiarly American than they might otherwise be. As was the case for Catholic law schools in the United States, Catholic colleges and universities in the United States were for the most part created to support the needs and aspirations of the marginalized immigrant Catholic newcomers to American society. The desire to educate and assimilate mostly poor, often illiterate, immigrant outsiders strikes me as something the Church appropriately would seek to do in the interest of giving American Catholics the tools they needed to have a meaningful impact on the shaping of the future United States. It also is deeply consistent with priorities Jesus announces in the Gospels.

³ *Id.* at 41–45.

⁴ *Id.* at 29–38.

⁵ Australia may provide one modest parallel to the American experience. Two Catholic law schools, Notre Dame Australia and Australian Catholic University, demonstrate some similarities in their development to their American counterparts.

Therefore, before we accept the argument that Catholic law schools in the United States have “failed” as *Catholic* institutions, it seems worthwhile to acknowledge how successful these institutions have been in achieving the purposes for which they were originally founded.

These schools pursued a Catholic project of aggressive engagement with the world through the education and assimilation of the faithful into a burgeoning new nation. If Catholic legal education never really was a Catholic intellectual project to begin with, why define the past manifestations and explanations of identity as failures? It strikes me as very “Catholic” to take on the task of educating marginalized members of society, offering them a means to seek a more fully human existence in a new country, and sending them into the mainstream with the hope that they will be agents of social and cultural transformation. I think the authors agree with this idea when they note that “the founding of Catholic colleges and universities and their attendant law schools was always a corporate religious practice. As a result, sponsoring these institutions was an ineluctably Catholic and faith-filled enterprise.”⁶

Given this history, the mission of Catholic law schools has always been oriented toward social justice, which springs from a unique history and different priorities than would be the case at secular law schools. If there has been a failure in this regard, it may well be that this mission has been much less vigorously pursued as the most recent waves of Catholic immigrants have arrived from Latin America, Asia, and Africa. In the American context, Catholic institutions may well fail in their Catholic mission when they focus too heavily on maintaining the privilege of those they already have assimilated.

Thus, I think the authors may be too harsh when they assess the past as a failure of Catholic identity and imagination. I believe what they now are seeking is a reframing of the mission of Catholic law schools by structuring them around a more explicit and meaningful engagement with the Catholic intellectual tradition. The past need not be a failure in order to argue for this as the best direction for the future.

⁶ Breen & Strang, *supra* note 1, at 42.

II. THE CATHOLIC INTELLECTUAL TRADITION AS THE ARCHITECTURE FOR A CATHOLIC LAW SCHOOL IN A POST-PANDEMIC WORLD

To be truly Catholic law schools, Breen and Strang argue the following:

Catholic law schools must be essentially committed to a Catholic conception of legal practice and legal education that orders and justifies their intellectual heart. At their core—in their faculty, scholarship, curriculum, and pedagogy—Catholic law schools must possess a Catholic approach to legal education. We argue that the Catholic intellectual tradition, focused on a Catholic anthropology of the human person, is the likely best candidate to justify and order Catholic legal education.⁷

[T]o be distinctive, Catholic legal education must be *essentially* different. Though overlapping in many ways, a Catholic law school's point or purpose must be distinctive from what other law schools do. In slightly more detail, its scholarship, teaching, pedagogy and curriculum, and character formation must be distinctive both in substance and in purpose.

Catholic legal education must possess an internal integrity that provides guidance, coherence, and distinctiveness to the entire enterprise. We call this organizational principle, a school's "intellectual architecture."⁸

The authors offer a number of specific ways to do this,⁹ and I think intentional engagement of the Catholic intellectual tradition at Catholic law schools is a worthy goal broadly speaking. As the authors note, the Catholic intellectual tradition is a very broad category, and I am not fully convinced that it provides the kind of specificity needed to create a "distinctively Catholic law school," particularly one that will have broad appeal to students who want the best possible legal education. Will law schools organized in this fashion be compelling to students who have more prosaic concerns around limiting their educational debt and finding meaningful, reasonably remunerative employment?

⁷ *Id.* at 464.

⁸ *Id.* at 495.

⁹ *See id.* at 523–25 (describing how the Catholic intellectual tradition may practically serve as the architecture for Catholic law schools).

Will Catholic law schools be able to speak to the emerging needs of students and the profession in a landscape shaped by the aftermath of the coronavirus pandemic? Some probably will not. Catholic law schools need to survive in an intensely competitive higher education market, one in which many schools, including many Catholic law schools and universities, are struggling. We should prepare for the reality that a number of Catholic universities and law schools will not survive the current economic crisis and will likely close.

In a recent piece in the *New York Times*, Professor Michael Sandel reminded us that the COVID-19 pandemic is asking us to reconsider what social and economic roles matter most, and he called upon us to begin the process of reconfiguring our economy and society around the principles of solidarity and the common good:

For example, should we consider a federal wage subsidy to ensure that workers can earn enough to support thriving families, neighborhoods and communities? Should we bolster the dignity of work by shifting the burden of taxation from payroll taxes to taxes on financial transactions, wealth and carbon? Should we reconsider our current policy of taxing income from labor at a higher rate than capital gains? Should we encourage the domestic manufacture of certain goods—beginning with surgical masks, medical gear and pharmaceuticals—rather than promoting outsourcing to low-wage countries?

Even when they recede, pandemics and other great crises seldom leave social and economic arrangements as they were. It is up to us to decide what the legacy of this wrenching episode will be.¹⁰

For Catholics, Sandel is speaking almost verbatim from Catholic social teaching. Indeed, if there were any doubt about the connection, on Easter Sunday, 2020, Pope Francis issued a letter to those in popular movements in which he said:

My hope is that governments understand that technocratic paradigms (whether state-centred or market-driven) are not enough to address this crisis or the other great problems affecting humankind. Now more than ever, persons, communities and

¹⁰ Michael J. Sandel, Opinion, *Are We All in This Together?*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/opinion/sunday/covid-workers-healthcare-fairness.html> [<https://perma.cc/64K5-KU6T>].

peoples must be put at the centre, united to heal, to care and to share.¹¹

Pope Francis went on to suggest that it may be time for nations to consider a universal basic income to address the needs of those who have been excluded from the benefits of globalization and whose sufferings and struggles have now become much more broadly visible in the wake of the pandemic. The challenge I believe that Catholic law schools should take up is evaluating and potentially dismantling the structures of our society and economy that enrich the few who are powerful and privileged and move to create new ones that dignify and uplift the lives of the many who are weak and marginalized.

The Jesuits have developed ideas on how to ground a university in the Catholic intellectual tradition, and these concepts might be a useful point of dialogue for the authors as they refine their manuscript and consider what would truly make a law school Catholic in the context of the challenges that lie before us. For example, *The Catholic Intellectual Tradition: A Conversation at Boston College*¹² states:

A university illuminated by the Catholic intellectual tradition is a place of shared, transformative, intellectual life—a place where the Church, always acknowledging that there is more to learn, is informed by ongoing scholarship, and where the wisdom developed over centuries within the Catholic tradition permeates a university's core values, curriculum, and search for truth.¹³

The idea of placing the Catholic anthropology of the human person at the core of what a Catholic law school does, as the authors suggest, strikes me as an essential part of the institutional architecture of a Catholic law school, and I think one way to do that is by building a legal profession for a society that values the lives of those who

¹¹ POPE FRANCIS, LETTER OF HIS HOLINESS POPE FRANCIS TO THE POPULAR MOVEMENTS (Holy See, Apr. 12, 2020), http://www.vatican.va/content/francesco/en/letters/2020/documents/papa-francesco_20200412_lettera-movimentipopolari.html [<https://perma.cc/EE2S-82JY>].

¹² CHURCH IN THE 21ST CENTURY CTR., THE CATHOLIC INTELLECTUAL TRADITION: A CONVERSATION AT BOSTON COLLEGE (July 2010), <https://www.bc.edu/content/dam/files/top/church21/pdf/Catholic%20Intellectual%20Tradition%20cropped%20pages.pdf> [<https://perma.cc/Z27X-4C58>].

¹³ *Id.* at 14.

live from day to day, without any type of legal guarantee to protect [them]. Street vendors, recyclers, carnies, small farmers, construction workers, dressmakers, the different kinds of caregivers: [those] who are informal, working on [their] own or in the grassroots economy, [who] have no steady income to get . . . through this hard time.¹⁴

Not only would this express a commitment to the Catholic intellectual tradition, Catholic social teaching, and the Catholic anthropology of the human person, but it reunites the project of Catholic law schools in the United States to their historic root by serving the outcast, the stranger, the excluded, and the marginalized. Ultimately, the law and the legal system should be a tool for bringing those people into meaningful solidarity and community with the broader society in which they live.

These points of inquiry strike me as relevant to what a Catholic law school does and ought to do, and in the context of *A Light Unseen*, they suggest that rooting the vision of a Catholic law school in Catholic social teaching may actually have adequate intellectual and theological heft for the task. Why limit Catholic social teaching to courses, endowed lectures, and academic articles? A Catholic law school gives us the opportunity to live the teaching in a meaningful way and to use it as a tool of human and societal transformation. What an exciting and faith-filled way to create truly distinctive Catholic institutions!

Breen and Strang were concerned that Catholic social teaching “does not have the resources to structure and justify an adequate course in jurisprudence [I]t also lacks the capacity to do so for most of the substance of most law courses, because the nature of law and the details of positive law have not been its focus.”¹⁵

Given the growing evidence of the broad inadequacy of our current political and economic structures, I would encourage the authors to look beyond some of the limitations they see in Catholic social teaching as an organizing principle for a distinct Catholic law school. Indeed, as we can see from Professor Sandel’s work, Catholic social teaching is a platform for engagement for many people of goodwill who do not share our religious commitments, but who embrace many of our values. This provides a space for scholars and students at Catholic law

¹⁴ POPE FRANCIS, *supra* note 11.

¹⁵ Breen & Strang, *supra* note 1, at 507.

schools to engage critical questions around solidarity and the common good more deeply in light of their legal training and professional experience, and it provides new answers to those questions as political, economic, and social conditions change. This is a wonderful example of how Catholic law schools can offer something very different to the education and professional formation that most secular law schools provide.

CONCLUSION

What makes a law school Catholic? Is there only one answer? Professors Breen and Strang have developed a deep and compelling study of the history of Catholic legal education in the United States. They also have argued that today, they do not view most Catholic law schools as Catholic in any meaningful sense. I am sure a great deal of discussion will follow from this point. I think the way they seek to define a law school as Catholic is one way, but it is not the only way. Law schools are educating men and women to enter a profession that is at the heart of the discourse on rights, responsibilities, and freedoms in a pluralist democracy. There are many distinctive ways a Catholic law school can contribute to this dialogue and to the formation of the professionals who shape it. Whatever form Catholic law schools take in the future, they will need to be agile if they wish to remain relevant in a dynamic and fiercely competitive market for professional education—and in a world where a pandemic has laid bare the many ways in which our current social, political, and economic arrangements have proved inadequate.